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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1970

No. 1545

JACK STEVEN KARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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October Term 1970
No. .....

JACK STEVEN KARNES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Jack Steven Karnes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 22, 1971.

Opinions Below.

The District Court for the Central District of California did not render an opinion. The opinion of the Court of Appeals is not yet reported in the Federal Reporter, Second Series; it is set forth as Appendix A to this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 22, 1971. A copy thereof is attached hereto as Appendix "B". The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

This petition is not filed within the time prescribed by Rule 22 of this Court because of the circumstances set forth in the Affidavit of James H. Webster, attached to this petition as Appendix "C". The petition should have been filed on or before February 22, 1971. The untimely filing is not jurisdictional, and does not bar this Court from exercising its discretion to hear this case. *Taglianetti v. United States,* 394 U.S. 316 (1969); *Heflin v. United States,* 358 U.S. 415 (1959).

Questions Presented.

1. Is the right to pursue gainful employment in the lawful occupation of one's choice a "fundamental" right which Congress may not abridge except as a "necessary" means of achieving a "compelling" governmental interest?

2. Does 18 U.S.C. Appendix Section 1202(a)(2), which prohibits receipt and possession of firearms to persons discharged from the Armed Forces under dishonorable conditions (including, persons discharged for desertion and other wholly non-violent and strictly military offenses), deprive petitioner of liberty and property without due process of law because it prohibits him from pursuing gainful employment in the lawful occupation of his choice solely on the basis of a conviction by a court-martial in 1945 for desertion?

3. Is a conviction by court-martial for any offense which is unishable by imprisonment exceeding one year (including the offense of desertion), the equivalent under law of a felony conviction by a civilian court, and therefore a proper basis for depriving persons so convicted of myriad fundamental civilian rights and liberties, including the right to pursue gainful employment in the lawful occupation of one's choice?

4. Is 18 U.S.C. Appendix Section 1202(a)(2), which prohibits receipt and possession of firearms to persons discharged from the Armed Forces under dishonorable conditions (including persons discharged for desertion) a rule of general applicability specifying acts which, if performed, or characteristics, which if possessed, by any person, Congress can properly infer that such person is likely to engage in acts of armed violence; or is the statute a constitutionally prohibited Bill of Attainder because it specifies the *persons* to whom it proscribes the receipt and possession of firearms?

5. Is 18 U.S.C. Appendix Section 1202(a)(2), enacted in 1968, an *ex post facto* law as applied to petitioner, in that it prohibits him from pursuing gainful employment in the lawful occupation of his choice on the basis of a conviction in 1945 by court-martial for desertion?

Constitutional Provisions, Statutes and Rules Involved.

Article I, Section 9, Clause 3 of the Constitution of the United States provides as follows:

> "No Bill of Attainder or ex post facto law shall be passed."

Amendment V to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of . . . liberty or property without due process of law."

18 U.S.C., Section 1 provides in pertinent part as follows:

> "Notwithstanding any Act of Congress to the contrary:
> (1) Any offense punishable by death or inprisonment for a term exceeding one year is a felony."

18 U.S.C., Appendix provides in pertinent part as follows:

"Section 1201.

"The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each state guaranteed by Article IV of the Constitution."

Section 1202(a).

"Any person who—

* * *

(2) has been discharged from the Armed Forces under dishonorable conditions,

* * *

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Article 58, Articles of War, 41 Stat. 800, provided as follows:

> "Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and if the offense be committed at any other time, any punishment excepting death that a court-martial may direct."

Rule 22 of the Rules of the Supreme Court provides in pertinent part as follows:

> "2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it is filed within thirty days after the entry of such judgment."

Statement of the Case.

Basis for Jurisdiction in the District Court.

Jurisdiction of the United States District Court for the Central District of California was invoked under 18 U.S.C., Section 3231.

Indictment.

Insofar as is here pertinent, the indictment charged that on or about February 7, 1969, the petitioner, being a person who has been discharged from the Armed Forces under dishonorable conditions, received and possessed certain firearms in commerce and affecting commerce [C.T. 2].* Petitioner was convicted and given a five-year probationary sentence [C.T. 92].

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*C.T. and R.T. designate the Clerk's Transcript and Reporter's Transcript respectively.

Factual Background.

While stationed in England in the United States Army in 1945 petitioner was convicted by a court-martial of the offenses of desertion,* a wholly non-violent and strictly military offense having no counterpart in civilian law, and consisting of only two elements: "absence from duty plus the intent not to return".** Upon such conviction, he was sentenced to ten years in prison and was dishonorably discharged from the Armed Forces [R.T. 513-515, Plaintiff's Exhibit 43].

Prior to the passage of 18 U.S.C., Appendix Section 1202(a)(2) and continuing until his indictment in this case in 1969, petitioner operated a business of which the welding, machining, and repair of firearms and firearm components constituted a substantial part.***

Prior to June, 1968, there was no prohibition on such activity affecting petitioner, and, even now, receipt and possession of firearms is permitted to persons generally. Since that time, however, 18 U.S.C., Appendix Section 1202(a)(2) prohibits receipt and possession of firearms to persons discharged from the Armed Forces under dishonorable conditions. The statute pro-

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*Articles of War 58, 41 Stat. 800.

**_Trop v. Dulles_, 356 U.S. 86, 90-91 (1950).

***The substantiality of petitioner's business relating to the welding, machining and repairing of firearms and firearm components was indicated by evidence introduced by the Government at trial. A review of just a few of the petitioner's invoices shows numerous transactions involving welding and milling operations on receivers and frames [R.T. pp. 827, 833-834, 839] and that prior to the passage of the statute under which he was convicted, petitioner had posed and was photographed for a magazine article demonstrating a unique welding and machining process for reassembling frames and receivers of firearms [R.T. pp. 624-625; Pltf. Exs. 31-35].

vides for no exception in the case of persons engaged in a lawful occupation to which the receipt or possession of firearms is a necessary incident.

The statute thus renders unlawful the pursuit by petitioner of his chosen occupation, solely because of his 1945 dishonorable discharge, based upon his court-martial conviction for desertion. Moreover, it would prohibit him and all other dishonorably discharged veterans from engaging in any of the many other occupations requiring the receipt or possession of firearms.

Appeal.

The United States Court of Appeals for the Ninth Circuit affirmed petitioner's conviction. The Court of Appeals reasoned that "any person who has committed some crime in the past, might commit a crime of violence in the future", and, accordingly, that the prohibition of 18 U.S.C., Appendix Section 1202(a)(2) "is not without some rational basis".

The Court recognized that the effect of the statute was to restrict petitioner in his employment because he cannot now work on firearms in his business. It held, however, that the petitioner's right to engage in his chosen occupation was not a fundamental right, and that it was unnecessary for the government to demonstrate that the statute was a necessary means of achieving a compelling governmental interest.

Rather, the Court held that absent positive factual proof by petitioner to the contrary, "Common sense . . . indicates that persons with criminal convictions would have more of a tendency to commit a crime of violence than persons without criminal records" (Appendix A, p. 7). The Court then inferred from this

common sense notion the mere rationality which it found sufficient to uphold the validity of the statute.

The Court of Appeals characterized petitioner's court-martial conviction for desertion as "the military equivalent of a felony because he was sentenced to ten years in prison," and held that, absent other evidence, "the implicit finding that felons have a propensity for violence is clearly supportable" (Appendix A, p. 7 N. 20).

The Court of Appeals did not analyze the unique nature of the strictly military offense upon which petitioner's dishonorable discharge was based, nor did it analyze the procedures under the former Articles of War by which it was obtained. Rather, it assumed that because Congress has made desertion punishable by sentence in excess of one year in prison it constitutes a felony, and that persons convicted of desertion by courts-martial may be treated and classified as felons, so as to deprive them of fundamental civilian rights and liberties, such as the pursuit of gainful employment in the lawful occupations of their choice.

REASONS FOR GRANTING THE WRIT.

1. The Court Should Consider the Petition Notwithstanding Its Untimely Filing.

Preliminarily, petitioner requests the Court to consider this petition, notwithstanding its not having been filed within the period of time specified in paragraph 2 of Rule 22 of this Court. That time period is not jurisdictional (*Taglianetti v. United States, supra; Heflin v. United States, supra*); in both *Taglianetti* and *Heflin,* the Court considered and granted petitions for writs of certiorari which were filed after the expiration of the time specified in Rule 22. Under the circumstances of the delayed filing, the Court should exercise its discretion to entertain the petition.

The circumstances of the delay in filing the petition are set forth in the Affidavit of James H. Webster, attached as Appendix "C" to the petition. They are that prior to the decision in the court of appeals, petitioner had instructed counsel before such court to file a petition for writ of certiorari with this Court in the event of a decision by the court of appeals adverse to him.

Counsel for petitioner before the Court of Appeals inadvertently misapprehended the length of time within which the petition must be filed under Rule 22. Believing such period to be ninety days from the entry of judgment in the Court of Appeals, he commenced preparation of the initial draft of this petition on March 15, 1971, so as to be able to have counsel for petitioner before this Court complete and file the petition

not later than April 22, 1971, the date on which the misapprehended ninety-day period would expire. In reviewing the rules of this Court in connection with preparing the petition, counsel for petitioner in the Court of Appeals realized his error, and proceeded immediately to draft the petition and have counsel before this Court complete and file it at the earliest possible date thereafter.

Petitioner could, of course, still move the District Court under 28 U.S.C., Section 2255 to review his conviction. He could appeal to the Court of Appeals from an adverse determination of such motion in the district court, and thereafter again petition this Court for a writ of certiorari.

Requiring petitioner to resort to proceedings under 28 U.S.C., Section 2255 for the purpose of presenting this Court with a timely petition for a writ of certiorari, however, would create wasteful circuity of judicial proceedings. Such a result should be avoided where no jurisdictional statute is involved (*Heflin v. United States, supra*).

The sole issue presented herein is the constitutional validity of 18 U.S.C. Appendix Section 1202(a)(2). Said provision has not only subjected petitioner to criminal prosecution, but has also deprived him of the right to pursue the occupation of his choice, or any other occupation to which the receipt or possession of firearms is a necessary incident, solely on the basis of his 1945 court-martial conviction for desertion. In the interests of justice and the proper administration of jus-

tice, the Court should entertain the petition, notwithstanding its untimely filing.

2. The Right to Pursue the Occupation of One's Choice Is a "Fundamental" Right Which Congress May Not Abridge Except as a Necessary Means of Achieving a Compelling Governmental Interest.

The decisions of this Court establish that the right to hold specific employment, both public and private, and to follow a chosen vocation or profession, free from unreasonable governmental interference, comes within the "liberty" and "property" concepts of the Fifth Amendment, and thus is protected by the Due Process Clause. *United States v. Robel,* 389 U.S. 258, 264 (1967); *Green v. McElroy,* 360 U.S. 474, 492 (1959); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Dent v. State of West Virginia,* 129 U.S. 114 (1889), *cf. Cummings v. Missouri,* 4 Wall. 277, 321 (1867)). This Court has not yet ruled, however, whether the right to engage in one's chosen occupation should be treated as "fundamental" and thus subject to legislative restriction other than as a necessary means of achieving a compelling governmental interest.

In passing on the validity of various legislative classifications under the Due Process Clause, this Court has employed two separate standards. In the area of economic regulation, classifications have been upheld upon a mere showing that there is some rational relationship between the classification and any governmental purpose. See *e.g., Lindsley v. Natural Carbonic Gas Co.,*

220 U.S. 61, 78 (1911); *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). In the case of classifications which restrict the exercise of "fundamental rights", however, the government must demonstrate that the classification is a "necessary" means of promoting a "compelling" governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

The question of which of the above two standards is applicable in measuring the constitutional validity of legislative restrictions on the right to pursue gainful employment in the occupation of one's choice is important and warrants consideration by this Court. State courts and inferior federal courts are presently without guidance by this Court concerning which of the above two standards to employ in passing on the validity of the myriad classifications variously affecting the right to engage in the occupation of one's choice.

The Court of Appeals in this case held that the right to choose one's employment is not entitled to the protection of the stricter standard applicable in the case of fundamental rights, and that persons may be excluded from pursuing the lawful occupation of their choice by legislation having merely a rational factual basis. It stated:

> "Adequate protection of the right to engage in particular employment would seem to be furnished by the traditional test for Due Process—whether there is a rational factual basis for the legislation." (Appendix A, p. 4).

Moreover, the Court of Appeals held that a person challenging a legislative classification which effectively deprives him of the right to pursue the occupation of his choice must present positive factual proof of the irrationality of the classification in order to overcome a presumption of constitutionality. Without analyzing either the nature of the strictly military offense of desertion, or the nature of the court-martial procedures by which peitioner's conviction for desertion was obtained, the Court stated:

> "Karnes has presented nothing to dispel the idea that a person who committed some crime in the past might commit a crime of violence in the future"* (Appendix A, p. 7).

In contrast to the Court of Appeals in this case, the California Supreme Court has recently characterized the right to pursue the occupation of one's choice as a "fundamental" right, and held that such right may not be restricted by the government, except in accordance with the stricter standard applied by this Court in *Shapiro, supra,* whereby the government must establish that the restriction is a necessary means of achieving a compelling government interest (*Purdy & Fitzpatrick v. State of California,* 71 Cal. 2d 566 (1969)).

If the Court of Appeals is correct, and if the proper rule is that courts should apply the same standard in

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*The Court of Appeals also relied on *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), which upheld regulatory legislation affecting ordinary commercial transactions on the basis of mere rationality. In *Carolene Products,* however, this Court recognized a much narrower scope for the operation of any presumption of constitutionality based upon legislative findings, when legislation affecting personal liberties is involved (*Id.,* p. 152, n. 4; see *Skinner v. Oklahoma,* 316 U.S. 535, 544 (1942), concurring opinion).

measuring the constitutional validity of legislative classifications restricting the right of persons to pursue their chosen occupations as they apply in testing classifications regulating ordinary commercial transactions—a standard of mere rationality—such a rule should be established only after full consideration by this Court.

Petitioner urges this Court that the right to engage in the lawful occupation of one's choice should be protected by the stricter constitutional standard applicable to restrictions on the exercise of fundamental rights. In *Shapiro, supra,* the Court reviewed certain welfare eligibility classifications and recognized as a fundamental interest one's economic means of subsistence. The Court stated:

> "On the basis of this [classification] the first class is granted and the second class is denied welfare aid among which may depend the ability of the families to obtain the very means to subsist—food, shelter and other necessities of life". (349 U.S. at 627).

In the instant case, the right of the petitioner to obtain the means to subsist—through gainful employment in his chosen occupation—to earn food, shelter and other necessities of life, is severely restricted by the classification established by 18 U.S.C., Appendix Section 1202(a)(2). For by this classification he has been deprived of the right to pursue his chosen lawful occupation.

The statute also deprives the petitioner and thousands of other persons discharged from the Armed Forces under dishonorable conditions of the right to gainful employment in any of the lawful occupations of policeman, private security or bank guard, armored

car service employee, park ranger, sporting goods dealer, or any of the many other lawful occupations to which the receipt and possession of firearms is a necessary incident.

The Court should grant this petition for writ of certiorari to consider whether restrictions on the right to pursue one's chosen occupation may be upheld upon a basis of mere rationality, or whether such restrictions may be sustained only upon a showing by the government that they constitute a necessary means of achieving a compelling governmental interest.

3. Due Process Is Violated Where a Discharge From the Armed Forces Under Dishonorable Conditions Imposed by the Sentence of a Court-Martial Is Made the Basis for a Deprivation of Fundamental Civilian Rights and Liberties.

This Court has not yet considered the question whether a conviction by court-martial, with all the attendant limitations on the rights of the individual inherent in military law, may constitutionally be made an element of a civilian criminal offense or the basis for the deprivation of fundamental civilian rights and liberties. The Court of Appeals, however, held that a court-martial conviction for an offense punishable by imprisonment exceeding one year is the equivalent of a felony conviction by a civilian court of law. The court stated:

> "at least as to Karnes who committed the military equivalent of a felony because he was sentenced to ten years in prison (18 U.S.C. §1), there can be no doubt that absent other evidence the implicit finding that felons have a propensity for violence is clearly supportable." (Appendix A, p. 6, n. 20).

One of the obvious ramifications of the holding of the Court of Appeals is to render all dishonorably discharged veterans (including those court-martialed for desertion, for falling asleep at their posts, or for other non-violent and strictly military offenses having no counter-part in civilian law) subject to identical treatment under law as convicted felons, and thus subject to legislative action prohibiting them from pursuing many types of lawful employment and depriving them of many fundamental civilian rights and liberties. Such prohibitions and deprivations are common in the case of convicted felons.*

Under the rationale of the Court of Appeals, the myriad serious disabilities now imposed upon felons could be legislatively imposed upon any person convicted by court-martial of an offense punishable by imprisonment exceeding one year (18 U.S.C., Section 1).

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*In California, for example, persons standing convicted of a felony are not eligible to vote (California Constitution, Article I, Section 2), practice law (California Business and Professions Code, Section 6106), dentistry (*Id.*, Section 1679), medicine (*Id.*, Section 2383), optometry (*Id.*, Section 3094), or veterinary medicine (*Id.*, Section 4882(b)); they are also barred from being licensed as an accountant (*Id.*, Section 5100) pharmacist (2d, Section 4214), architect or landscape architect (*Id.*, Sections 5577, 5675), clinical laboratory technician (*Id.*, Section 1320 (k)), real estate salesman (*Id.*, Section 10177 (b)), barber (*Id.*, Section 6576), building contractor (*Id.*, Section 7123), seeing-eye dog trainer (*Id.*, Section 7211.9), private detective (*Id.*, Section 7551(d)), or dry cleaner (*Id.*, Section 9540.3(d)).

Further, convicted felons have been barred from holding public office (*Crampton v. O'Mara*, 139 N.E. 360, error dismissed 267 U.S. 575 (1925)) or union office (*DeVeau v. Braisted*, 363 U.S. 144 (1960)), and from testifying as a witness in judicial proceedings (*Holman v. Lawton*, 362 F. 2d 1 (5th Cir., 1966); they often are required to register with local authorities (*cf. Lambert v. California*, 355 U.S. 225 (1957); incur heavier penalties than others if convicted of a subsequent offense (California Penal Code, Section 3024); and suffer many other restrictions on fundamental civil rights and liberties.

Such pervasive deprivation of fundamental civilian rights and liberties should not be extended to persons convicted by court-martial. In any event, no such extension should be made without first having received the full consideration of this Court.

There are fundamental differences between military and civilian trials concerning the protection afforded by each to the rights of an accused individual.* These differences require that the effect given to convictions by courts-martial be narrowly limited and that they not be permitted to form the basis for deprivation of basic civilian rights and liberties, such as the pursuit of gainful employment in the occupation of one's choice.

The lack of protection of the rights of the accused in a trial by court-martial has been justified on the basis of a need to maintain military discipline, as an incident to the primary fighting function of the Armed Forces (*O'Callahan v. Parker, supra; United States v. Quarles,* 350 U.S. 11 (1955); *McElroy v. Guagliardo,* 361 U.S. 281 (1960); *Grisham v. Hagan,* 361 U.S. 278 (1960); *Kinsella v. United States,* 361 U.S. 234

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*Some of the fundamental differences between trial by a court-martial and trial by a civilian court were pointed out by this Court in *O'Callahan v. Parker,* 395 U.S. 258, 263-264 (1969):

> "A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."

(1960); *Reid v. Covert,* 354 U.S. 1 (1957)). As this Court recently stated,

> "None of the travesties of justice perpetrated under the U.C.M.J. [Uniform Code of Military Justice, 10 U.S.C., Section 800 et seq.] is really very surprising, for military law has always been and continues to be an instrument of discipline, not justice."*

Because the rights of accused persons tried by court-martial are not afforded the same basic protections of the Bill of Rights and Article III of the Constitution applicable in the case of criminal defendants in civilian courts, this Court has placed severe restrictions on court-martial jurisdiction. The Court has imposed such restrictions in order to leave military courts possessed of "the least power adequate to the end proposed" (*O'Callahan v. Parker, supra,* 395 U.S. at 264; *United States v. Quarles, supra,* 350 U.S. at 23), *i.e.,* the maintenance of military discipline.

For example, the Court has limited court-martial jurisdiction to persons who are members of the Armed Forces at the times of both the offense and the trial (*O'Callahan v. Parker, supra,* 395 U.S. at 267). The Court has also excluded from court-martial jurisdiction civilian offenses committed by members of the Armed Forces while off base and not on duty. (*Ibid.*)

Although the Court has held that a person discharged from the Armed Forces may not thereafter be subjected to trial by court-martial, it has not yet determined the effect which constitutionally may be accorded a soldier's conviction by court-martial following

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O'Callahan, supra, 395 U.S. at 266, quoting from Glasser, Justice and Captain Levy (2 Columbia Forum 46, 49 (1969)).

his return to civilian life. This case presents this serious issue for the Court's consideration.

Moreover, even if the Court were to conclude that convictions by courts-martial conducted under the Uniform Code of Military Justice (U.C.M.J.) may form the basis for restrictions on fundamental rights and liberties of ex-servicemen in civilian life, such effect should not be given to convictions by courts-martial conducted prior to the adoption of the U.C.M.J. Petitioner, and many thousands of other ex-servicemen, were convicted by wartime courts-martial under the former Articles of War. Such proceedings afforded the basic rights of accused soldiers far less protection even than does the U.C.M.J.*

Petitioner urges that Congress may not constitutionally deprive persons of fundamental civilian rights and liberties based on convictions by courts-martial under present court-martial procedures, which do not satisfy the standards of due process of law applicable in civilian courts. *A fortiori* Congress may not constitutionally deprive persons of such rights on the basis of convic-

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*The U.C.M.J. required for the first time that the presiding officer in the court-martial have legal training and perform a function similar to that of a civilian judge (10 U.S.C., Section 826). Counsel for the prosecution and the defense were required for the first time to have legal training and to be certified as competent by the Judge Advocate General (10 U.S.C., Section 827).

The U.C.M.J. established boards of review composed of attorneys to review cases in which a court-martial had imposed a serious sentence (such as dishonorable discharge or imprisonment exceeding one year) (10 U.S.C., Section 866); and perhaps most importantly, the U.C.M.J. established the Court of Military Appeals, consisting of independent civilian judges (10 U.S.C., Section 867). Prior thereto, there was no appellate review whatever of court-martial convictions, and review by habeas corpus was limited to jurisdictional attacks—guilt or innocence could not be reviewed (*Swaim v. United States,* 165 U.S. 553, 566 (1897)).

tions, such as that of petitioner, by wartime courts-martial under the former Articles of War.

We have discussed above the basic questions raised by the utilization of convictions by courts-martial for *any* offense, as a basis for depriving ex-soldiers of fundamental rights and liberties in civilian life. If such convictions may, under certain circumstances, be utilized for such purpose, a serious question arises with respect to the types of offenses which may serve as the basis for such deprivations. Petitioner urges that, contrary to the view enunciated by the Court of Appeals below, non-violent and strictly military offenses such as desertion or falling asleep on post may not be equated with felonies under civilian criminal law, and may not properly serve as the basis for the imposition of civil disabilities.

In *Trop v. Dulles, supra,* this Court considered the question whether conviction by court-martial for desertion could properly form the basis of a deprivation of a person's citizenship. The Court recognized that the use of court-martial convictions, and particularly court-martial convictions for desertion, as a basis for depriving civilians of the fundamental rights of citizenship, raised serious issues in the area of defining the proper relationship between civilian and military authority (356 U.S. at 91). Because the Court concluded, however, that deprivation of citizenship constituted a cruel and unusual punishment, prohibited by the Eighth Amendment, it found it unnecessary to deal with these serious issues (*Ibid.*).

This case again raises for the Court's consideration the "serious issues" recognized by the Court in *Trop, supra,* concerning the proper relationship between civilian and military authority. They are still unresolved

by this Court; they are at least as serious now as they were when presented to this Court in *Trop*. Moreover, the ramifications of the opinion of the Court of Appeals extend substantially beyond the issues presented in *Trop*, because the opinion in the Court of Appeals equates dishonorably discharged veterans with felons convicted by civilian courts, and would make such veterans subject to the same legislative treatment now afforded felons, including the myriad deprivations and restrictions of fundamental civilian rights and liberties.

The Court should consider and resolve these important issues by granting this petition for writ of certiorari.

4. Conviction for a Felony Should Not Be a Proper Basis for Wholesale Deprivation of Fundamental Civil Rights and Liberties.

In the foregoing section, we set forth a number of ways in which convicted felons are subjected to wholesale deprivation of fundamental civil rights and liberties. The restrictions imposed by California law on fundamental rights of convicted felons are typical of restrictions imposed by state laws throughout the nation.*

We believe that veterans discharged from the Armed Forces under dishonorable conditions may not be treated under the law in the same manner as persons convicted of felony offenses by civilian courts of law. If this Court should disagree, however, then a serious question arises concerning the continuing constitutional validity of the many laws depriving convicted felons of such fundamental rights and liberties.

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*A collection of such laws is found at 175 ALR 784.

The restrictions and deprivations imposed by the instant statute and other such laws carry over in time far past the execution of any sentence imposed. They deprive such persons of the fundamental rights, among others to vote, to run for public office, and to pursue gainful employment in the occupation of their choice.

Petitioner urges that many of such restrictions on fundamental rights, and particularly on the right to pursue gainful employment in the occupation of one's choice, are unreasonable, overly harsh, and contrary to accepted notions of rehabilitative justice. They should be held to violate the guarantees of due process of law and the equal protection of the laws, unless demonstrated to be a necessary means of achieving a compelling governmental interest.

This Court should grant this petition for certiorari to consider these serious issues.

5. 18 U.S.C. Appendix Section 1202(a)(2) Is a Bill of Attainder, and With Respect to Petitioner, Is an Ex Post Facto Law Within the Prohibition of Article I., Section 9, Clause 3 of the United States Constitution.

The court of appeals held that 18 U.S.C., Appendix Section 1202(a)(2) is neither a Bill of Attainder nor *ex post facto* law. In so holding, the Court of Appeals decided a federal question in a way which conflicts with applicable decisions of this Court. Therefore, this Court should grant this petition for writ of certiorari to review the judgment of the Court of Appeals.

Article I, Section 9, Clause 3 of the United States Constitution provides:

> "No Bill of Attainder or ex post facto law shall be passed."

A. The Statute Is a Bill of Attainder.

The primary purpose of the twice-stated absolute Constitutional prohibition on Bills of Attainder was to implement the Constitutional separation of powers, and particularly to act as a restraint on the legislative exercise of the powers reserved to the judiciary (*United States v. Brown,* 381 U.S. 437 (1965)).

As the Court observed in *Brown,* the framers of the Constitution believed that, compared with the courts, their independent judges and juries, the legislature is not well suited to perform the judicial function. The Court concluded that by prohibiting Bills of Attainder, the framers of the Constitution "sought to guard against such dangers by limiting legislatures to the task of rule making" (381 U.S. 446), while the application of the rules to individuals in society is appropriately left to other departments.

The Court recognized the power of Congress under the Commerce Clause "to enact legislation designed to keep from positions affecting interstate commerce, persons who may use such positions to bring about political strikes", the evil against which the statute challenged in *Brown* was directed (381 U.S. 449, 450).* The statute, however, was not a generally applicable rule defining specifically the characteristics or acts, which characteristics, if possessed by any person, or which acts, if performed by any person, would make such person likely to initiate political strikes; rather, it specified which *persons* possessed such characteristics

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*In *Brown,* the Court sustained a challenge to Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for a member of the Communist Party to serve as an officer or certain types of employees of a labor union (29 U.S.C., Section 504 [1958 ed. supp. IV]).

or have committed such acts. Accordingly, the statute was held to be a Bill of Attainder.

Under the test employed by the Court in *Brown*, 18 U.S.C., Appendix Section 1202(a)(2) is a Bill of Attainder. The statute was enacted amid popular clamor over three tragic assassinations. Section 1202(a)(2) designates an easily ascertainable group of persons—those who have been discharged from the Armed Forces under dishonorable conditions. It prohibits the members of such group from receiving and possessing firearms—acts lawful to persons generally—under penalty of heavy fine or imprisonment.

The statute effectively prohibits such persons from engaging in any lawful occupation to which receipt or possession of firearms is a necessary incident. Thus, with respect to the petitioner, the statute " 'operates as a legislative decree of perpetual exclusion' from a chosen vocation" (*United States v. Lovett*, 328 U.S. 303, 316 (1946)).

The designation in 18 U.S.C., Appendix Section 1202(a)(2) of "any person who has been discharged from the Armed Forces under dishonorable conditions" does not constitute a "shorthand designation" for a group of persons possessing the characteristics which would make them likely to engage in the conduct which Congress has sought to prevent-namely, armed violence affecting interstate commerce and other proper federal interests. It is not a semantically equivalent designation of such a group, because it includes persons who have not committed such acts and who do not possess such characteristics, namely persons discharged from the Armed Forces under dishonorable conditions upon conviction by court-martial for desertion or other non-violent and strictly military offenses.

Accordingly, in enacting Section 1202(a)(2) of 18 U.S.C., Appendix, Congress did not exercise its rule-making function. Rather, it designated the person to whom its disabilities apply. Such designation is like the designation in *Brown, supra,* a constitutionally prohibited Bill of Attainder.

B. As Applied to Persons Discharged From the Armed Forces Under Dishonorable Conditions Prior to June 19, 1968, 18 U.S.C., Appendix Section 1202(a)(2) Is an Ex Post Facto Law.

An *ex post facto* law:

> "Imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." (*Cummings v. Missouri, supra,* 4 Wall. at 325-326; *Ex parte Garland,* 4 Wall. 333, 377 (1867)).

In *Cummings,* the State of Missouri, shortly after the end of the Civil War, imposed a test oath upon persons practicing certain professions, requring them to swear that they had taken no part in the rebellion against the Union. In *Garland,* a similar oath was required by federal statute, as a prerequisites to the practice of law in the federal courts.

Some of the acts required to be disclaimed by the respective test oaths in *Cummings* and *Garland* were not offenses at the time they were committed. Other acts in which the oaths were directed had been grave offenses at the time committed, punishable upon con-

viction by the imposition of heavy penalties, including fine and imprisonment.

The Court held that with respect to both such categories of acts, the disqualification achieved through the imposition of the oath constituted either an original or a further penalty for these acts. The oath was therefore held to constitute an *ex post facto* law with respect to both categories of acts.

Just as the legislatures in *Cummings* and *Garland,* through imposition of the test oath, disqualified a specific group of persons from pursuing certain otherwise lawful occupations on the basis of past acts, so in the instant case Congress, through passage of 18 U.S.C., Appendix Section 1202(a)(2), has disqualified persons discharged from the Armed Forces under dishonorable conditions from pursuing gainful employment in any lawful occupation to which the receipt or possession of firearms is a necessary incident.

The effect is the same in both cases: a new or increased penalty is imposed on the basis of past conduct. Therefore, 18 U.S.C., Appendix Section 1202 (a)(2), like the test oath requirements in *Cummings* and *Garland,* is an *ex post facto* law.

In two cases this Court has upheld legislation prohibiting persons from certain employment on the basis of felony convictions prior to the enactment of the legislation (*Hawker v. New York,* 170 U.S. 189 (1897); *De Veau v. Braisted,* 363 U.S. 144 (1960)). We believe that the Court should now clarify, limit, or reconsider its holdings in these two cases.

In *Hawker v. New York, supra,* the Court upheld a New York statute prohibiting the practice of medicine by persons who had been convicted of a felony. The petitioner, therein had been previously convicted of criminal abortion. In *De Veau v. Braisted, supra,* the Court upheld a statute prohibiting the solicitation of monies from waterfront workers for unions in which a convicted felon was an officer. The petitioner in *De Veau* had been convicted of grand larceny.

Each of these two cases should be interpreted as, or limited to, upholding the prospective imposition of disabilities on persons convicted of felonies by civilian courts of law prior to the enactment of such legislation, where there is a rational relationship between the conduct upon which such prior convictions were based and the evils the legislature may properly seek to prevent in the imposition of such disabilities.

In the instant case, petitioner's conviction below was based upon his discharge under dishonorable conditions from the Armed Forces in 1945 for desertion, an incident which bears no rational relation to the prohibition on his receipt or possession of firearms. Therefore, such prohibition must be regarded not as a rational determination of unfitness for such activity, but rather as a penalty imposed on the basis of past conduct.

Therefore, petitioner urges that, as applied to him, 18 U.S.C., Appendix Section 1202(a)(2) violates the constitutional prohibition against *ex post facto* laws.

Conclusion.

Petitioner has been deprived of the opportunity to pursue the occupation of his choice, lawful to persons generally, solely on the basis of his discharge from the Armed Forces under dishonorable conditions in 1945, after a court-martial conviction for desertion. The statute under which petitioner was convicted below is unconstitutional because it deprives petitioner of liberty and property without due process of law, is a Bill of Attainder, and is an *ex post facto* law.

The substantial questions raised herein warrant determination by this Court, and this petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN REINHARDT,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeal for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, *Plaintiff-Appellee,* v. Jack Steven Karnes, *Defendant-Appellant.* No. 25,490.

[January 22, 1971].

Appeal from the United States District Court, for the Central District of California.

Before: HAMLEY, BROWNING, and TRASK, Circuit Judges

TRASK, Circuit Judge:

In 1945 appellant, Jack Steven Karnes, was sentenced to ten years in prison and dishonorably discharged from the United States Army for the crime of desertion. After passage of the Omnibus Crime Bill and Safe Streets Act of 1968, Karnes received firearms shipped in interstate commerce to his business located in South El Monte, California, and performed various welding and machining operations on those firearms. In November 1968, Karnes crossed the California-Arizona border with 50 carbines and delivered them to a firearms dealer in Phoenix, Arizona. On these facts, Karnes was convicted by a jury for violation of 18 U.S.C. App. § 1202(a)(2), which prohibits a person who has been dishonorably discharged from the Armed Forces from receiving, possession, or transporting in commerce, any firearms.[1] A five-year probationary

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[1]18 U.S.C. App. § 1202(a)(2) provides in pertinent part:

"Any person who—

(2) has been discharged from the Armed Forces under dishonorable conditions, . . . and who receives, possesses,

(This footnote is continued on the next page)

sentence was imposed upon Karnes by the district judge in lieu of the statutory penalties of a $10,000 fine or imprisonment not to exceed two years, or both.[2] We have jurisdiction over this appeal. 28 U.S.C. § 2191.

Karnes disputes nothing on this appeal but the constitutionality of the statute he was convicted of violating. We find no violation of the Constitution, and we affirm the judgment.

Three challenges to the statute's constitutionality are raised: (1) that it violates the Due Process Clause of the Fifth Amendment; (2) that it is a Bill of Attainder; and, (3) that it is an Ex Post Facto law. We will deal with the Due Process claim first because it effectively answers the other constitutional questions.

THE DUE PROCESS CLAIM

The question raised by Karnes is whether the statute under which he was convicted violates the Due Process Clause of the Fifth Amendment if Karnes can prove that Congress had no basis for restricting the right to employment of those dishonorably discharged for nonviolent and petty crimes. His employment is restricted because he may not lawfully work on firearms in the course of his machining business. Karnes is a member of that class because he was discharged for a nonviolent crime—desertion.[3] Appellant first invites the

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or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

[2]18 U.S.C. § 3651 allows the district court discretion to impose either the statutory sentence or probation for a period not to exceed five years, regardless of the length of the statutory sentence.

[3]Karnes does not claim that the words of the statute are vague and that they fail to give sufficient notice of the act for which criminal liability is imposed to allow people to conform their conduct to the law.

court to hold the statutory classification invalid because it is not a necessary means of promoting a compelling governmental interest. *See Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). As appellant recognizes, this strict standard of review applies only if the classification threatens a basic civil right. *United States v. Thoresen,* 428 F.2d 654, 658 (9th Cir. 1970).[4]

The policy underlying careful inspection of statutes affecting such basic rights lies in the preferred position given to them, and thus the First Amendment furnished an abundant source of such rights,[5] but they have additional sources.[6] The concern of the courts in allowing broad legislation to affect basic rights is that the activity that our society has expressly or impliedly determined to protect and foster should not be discouraged without a clear showing of the need to restrict the right. Also, because the courts rarely have the opportunity to examine the infringement of these rights, they should take a staunch position to protect them at the earliest opportunity and allow the legislature to correct any deficiencies by narrowly redrafting the statute. Those

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[4]Labeling the right as "fundamental," *United States v. Guest,* 383 U.S. 745, 757-58 (1966), or "constitutional," *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969), or "guaranteed by the Bill of Rights," *Dandridge v. Williams,* 397 U.S. 471, 484 (1970), or "basic," *United States v. Thoresen,* 428 F.2d 654, 658 (9th Cir. 1970), adds nothing to the analysis of the reasons for the application of the strict standard of review, but as a shorthand term for the type of rights to which this analysis has been applied we adopt the term "basic."

[5]*E.g., United States v. Robel,* 389 U.S. 258 (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Bates v. Little Rock,* 361 U.S. 516 (1960).

[6]The Supreme Court has not felt it necessary to trace all basic rights to the Constitution. Some rights without a precise origin are nonetheless protected: Marriage, (*Loving v. Virginia,* 388 U.S. 1 (1967)), procreation (*Skinner v. Oklahoma,* 316 U.S. 535 (1942), and travel (*Shapiro v. Thompson,* 394 U.S. 618 (1969)) are examples of rights that do not have an express constitutional basis.

concerns, however, have no place here. All who are affected by this statute have engaged in activity that should be discouraged—criminal activity. And none are engaged in conduct—possession of firearms—that should be fostered or protected, nor are the rights at issue of the type that could not be constitutionally regulated by any statute,[7] nor is the interest here similar to any of those that are presently considered basic.[8]

The cases declaring the right to employment to be a right protected by the Fifth Amendment[9] are inapposite for they only bring the right within the "liberty and property" protected by the Fifth Amendment. Whether a higher standard of exactness is required to uphold the statute is another matter.[10] Adequate protection of the right to engage in particular employment would seem to be furnished by the traditional test for Due Process—whether there is a rational factual basis for the legislation.

Moreover, even if we were to afford the right to employment a preference, we would have to find an in-

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[7]*United States v. Robel,* 389 U.S. 258, 266-67 (1967), (statute punishing any member of the Communist Party who continued to work in a defense facility after the Party was ordered to register held unconstitutional because it did not distinguish between active and passive membership).

[8]Basic rights have been found to be among those rights protected by the First Amendment, *see* note 5 *supra,* or long impliedly recognized in a variety of constitutional provisions, *Shapiro v. Thompson,* 394 U.S. 618, 630 n.8 (1969), or fundamental to the very existence and survival of the race, *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942).

[9]*United States v. Robel,* 389 U.S. 258, 263 (1967) (dictum); *Greene v. McElroy*; 360 U.S. 447, 492 (1959) (implied holding); *Schware v. Board of Examiners,* 353 U.S. 232, 247 (1957) (implied holding); *Dent v. West Virginia,* 129 U.S. 114, 121-22 (1889).

[10]*Compare Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964).

fringement of that right. The statute here does not affect the total population and set up a barrier that everyone must pass in order to secure the benefits of certain employment.[11] Karnes is not totally deprived of his occupation and skill as a machinist although he is admittedly prevented from working upon one type of item—firearms. Karnes presented no evidence as to the extent of his business or whether he could continue as a machinist by working on other items. Thus there is some question whether this statute would sufficiently abridge the right to employment[12]—even if that right were accorded preferential treatment.

We see no reason for applying the strict standard of review to a Fifth Amendment claim that a legislative classification has abridged an economic interest,[13] but even if it were applied our conclusion would be the same.[14]

The interest asserted here is adequately protected by the traditional requirement that the means selected by Congress—the statutory classification—be reasonably calculated to achieve the legitimate end.[15] The statute may be striken only if it is clearly unfounded.[16] Thus we would first consider the legislative finding, then the

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[11]*Compare Dent v. West Virginia,* 129 U.S. 114 (1889) (requirements for a license to practice medicine).

[12]*Cafeteria Workers v. McElroy,* 367 U.S. 886, 894-98 (1961).

[13]*Dandridge v. Williams,* 397 U.S. 471 (1970).

[14]In *Sibron v. New York,* 392 U.S. 40, 59-62 (1968), the Court refused to decide whether a statute allegedly infringing upon Fourth Amendment rights was unconstitutional "on its face."

[15]*Schneider v. Rusk,* 377 U.S. 163, 166-67 (1964); *United States v. Thoresen,* 428 F.2d 654 (9th Cir. 1970). Appellant does not dispute the legitimacy of the goal of the statute—prevention of acts of armed violence.

[16]*Radice v. New York,* 264 U.S. 292, 294 (1924).

evidence brought before the court by the person challenging that finding and after weighing that evidence reach our conclusion.

> Congress found that "the receipt, possession, or transportation of a firearm by . . . veterans who are discharged under dishonorable conditions . . . constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States.
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State. . . ." 18 U.S.C. App. § 1201.

That legislative finding is entitled to some weight[17] and in the absence of contrary proof should compel a finding of constitutionality. Karnes failed to present any proof to compel a contrary conclusion. Rather, he rested his case upon the argument that only a person convicted for a past crime of violence could be expected to commit a crime of violence in the future.[18] He developed that argument by pointing out that dishonorable discharge may result from many offenses which are

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[17] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[18] A similar argument has been recently rejected. *United States v. Thoresen*, 428 F.2d 654 (9th Cir. 1970).

non-violent in character and the risk of repetition of which involve no consequences such as are sought to be prevented by section 1201. Karnes argues that the net thus snares too many in its meshes. It is overbroad generally and overbroad as to appellant whose dishonorable discharge was part of a sentence for desertion. Desertion, it is asserted, includes two simple, non-violent elements: absence from duty, and an intention not to return. Therefore, unde the rule of *Shapiro v. Thompson,* 394 U.S. 618 (1969), the statute must be invalid at least as to appellant.[19]

In *Shapiro,* however, there was a lack of legitimate purpose in the imposition of the restriction on a fundamental right. The result was a classification which constituted an invidious or impermissible discrimination. In this case the opposite is true. There is a legitimate end to be served. The interests which are sought to be promoted by the classification are constitutionally permissible objectives. As a matter of fact, Karnes has presented nothing to dispel the idea that any person who has committed some crime in the past might commit a crime of violence in the future. Common sense, at least, indicates that persons with criminal convictions would have more of a tendency to commit a crime of violence than persons without criminal records. Without proof to the contrary, we are compelled to reach the conclusion that this legislation is not without some rational basis. It is not clearly unfounded,[20] thus it is constitutional.

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[19]*Shapiro v. Thompson* is not discussed in terms of overbreadth which is most frequently reserved for First Amendment problems. *See* The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

[20]At least as to Karnes who committed the military equivalent of a felony because he was sentenced to ten years in prison

(This footnote is continued on the next page)

OTHER ARGUMENTS

Disposition of the Due Process claim necessarily disposes of the remaining contentions for the same standard is applicable to each claim. A Bill of Attainder is claimed to be present here because in Karnes' view the inference is impermissible that dishonorably discharged veterans might engage in acts of armed violence. We have found the inference permissible; moreover, this is not a legislative trial and punishment but only a legislative recognition of a prior established judicial fact—conviction.

Appellant also contends that this statute, because it was enacted after his discharge, penalizes him for past conduct and is therefore an Ex Post Facto law. But appellant submits the exception that where Congress has rationally concluded that persons who have demonstrated a tendency in the past to engage in conduct that Congress has the power to proscribe, Congress may restrict such future activities without violating the Ex Post Facto prohibition. Thus, resolution of the Due Process question disposes of appellant's arguments.[21]

The judgment is affirmed.

(18 U.S.C. § 1), there can be no doubt that absent other evidence the implicit finding that felons have a propensity for violence is clearly supportable. *Williams v. United States,* 426 F.2d 253 (9th Cir. 1970).

[21]*See generally Williams v. United States,* 426 F.2d 253 (9th Cir. 1970).

APPENDIX B.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. Jack Steven Karnes, Defendant-Appellant. No. 25490 (D.C. #3432 R Crim)

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A True Copy, Attest Feb. 19, 1971, Wm. B. Luck, by Raymond D. Hewitt, Deputy.

Filed and entered Jan. 22, 1971.

APPENDIX C.

Affidavit of James H. Webster.

State of California, County of Los Angeles—ss.

James H. Webster, being first duly sworn, deposes and says:

I am an attorney at law, duly licensed and admitted to practice before the courts of the State of California, the United States District Court, Central District of California, and the United States Court of Appeals for the Ninth Circuit. I was one of the counsel for petitioner, Jack Stevens Karnes, in the Court of Appeals.

Prior to the decision in the Court of Appeals the petitioner inquired what further review of his conviction would be available in the event of a decision by such Court adverse to him. I advised him that review by this Court could be sought by petitioning for a writ of certiorari, and he directed that a petition for such writ be filed with this Court in the event of a ruling by the Court of Appeals adverse to him.

Neither I nor the other counsel for petitioner before the Court of Appeals is presently admitted to practice before this Court. Accordingly, I intended, in the event of an adverse decision in the Court of Appeals, to draft the petition initially, and request Stephen Reinhardt, a partner in the law firm with which I am associated, to represent petitioner before this Court and to complete and file the petition.

When I received the decision of the Court of Appeals I misapprehended through inadvertence the length of time within which the petition for writ of certiorari had to be filed to be deemed timely under Rule 22 of this Court. I believed that the period was ninety days

from entry of judgment in the Court of Appeals, and that the petition would be timely if filed on or before April 22, 1971.

The basis for such misapprehension was that several months ago I had researched the period within which to file a petition for writ of certiorari in a civil action, and had determined that a ninety day period was applicable. I was unaware that a shorter period was provided for filing such petitions in criminal cases. I planned my work so that the foregoing petition could be filed with the Court no later than April 22, 1971, the day on which the misapprehended ninety-day period would expire.

I commenced preparation of the petition on March 15, 1971, and in reviewing the Rules of this Court, I realized my error. Thereafter, I requested Mr. Reinhardt to represent the petitioner before this Court, and he agreed to do so. I prepared the initial draft of the petition immediately so that he could complete and file it at the earliest possible date.

JAMES H. WEBSTER,

Subscribed and sworn to before me this 5th day of April, 1971.

MARGARET H. FALES,
Notary Public in and for said County and State.

My Commission expires January 11, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1545

JACK STEVEN KARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1945, petitioner was convicted by general court-martial of desertion from the armed forces and was sentenced to ten years' imprisonment and a dishonorable discharge. On June 19, 1968, Congress passed 18 U.S.C. App. (Supp. V) 1202(a), which, *inter alia*, makes it a crime if any person previously convicted of a felony or dishonorably discharged "receives, possesses, or transports in commerce or affecting commerce, * * * any firearm." Thereafter petitioner received firearms shipped in interstate commerce to his

business in California. In the course of his occupation as a machinist, he performed various welding and machining operations on the firearms. In November 1968, he traveled interstate to Phoenix, Arizona, to deliver 50 carbines to a firearms dealer.

Thereafter, petitioner was charged in a criminal indictment with unlawfully receiving and possessing firearms in commerce, in violation of Section 1202(a). After a jury trial in the United States District Court for the Central District of California, he was convicted of that offense and sentenced to five years' probation. The court of appeals affirmed on January 22, 1971 (Pet. App. B; 437 F. 2d 284).[1]

This case does not involve the question relating to Section 1202(a) that is raised in *United States* v. *Bass*, No. 1285 this Term, certiorari granted, March 29, 1971, and there is no relationship between the cases. The question in *Bass* is whether the statute punishes possession of a firearm not specifically proven to be "in commerce or affecting commerce." Here, however, the government in fact alleged and proved actual interstate transportation of the firearms.

In his petition, as in the court below, petitioner makes a variety of constitutional attacks upon the statute. His principal contention is that it is irrational for Congress to prohibit transactions in firearms by persons convicted of non-violent crimes. He also argues that the statute, as applied to persons who

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[1] The petition was filed on April 6, 1971, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

have been convicted or dishonorably discharged prior to its effective date, is an *ex post facto* law. These claims are fully answered in the opinion below (Pet. App. A), on which we rely here.

We point out, additionally, that since 1961 related statutes presently codified at 18 U.S.C. (Supp. V) 922(g) and (h)—formerly 15 U.S.C. 902(e) and (f)—have made it a crime for any person convicted of a felony to receive or transport any firearm in interstate commerce. The rationality of such a prohibition, as applied to a person convicted of a non-violent felony, has been considered in cases under these earlier, related statutes and sustained. *Williams* v. *United States*, 426 F. 2d 253 (C.A. 9), certiorari denied, 400 U.S. 881; *United States* v. *Thoreson*, 428 F. 2d 654 (C.A. 9). Moreover, an identical result has been reached by the Eighth Circuit on consideration of the instant statute. *United States* v. *Synnes*, No. 20,438, decided February 1, 1971, slip op. 12-13, pending on a petition for certiorari, No. 6805 this Term. It was reasonable for Congress to conclude, as it did implicitly in its formal findings relating to the instant statute (18 U.S.C. App. (Supp. V) 1201), that persons previously convicted of *any* serious crime would have a greater propensity than others to use firearms for improper purposes.[2]

Petitioner's argument that, as applied to him, Section 1202(a) is an *ex post facto* law is without merit.

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[2] There is no substance to petitioner's subsidiary argument that his court-martial conviction was not the equivalent of a felony. See *United States* v. *Lee*, 428 F. 2d 917, 919-920 (C.A. 6), rejecting the same claim as to former 15 U.S.C. 902(e).

The passage of the statute in June 1968 put petitioner on notice that transportation or receipt by him of a firearm in interstate commerce would violate federal law. He is thus not now being punished for conduct which was not criminally proscribed at the time of commission. See *United States* v. *Wechsler*, 392 F. 2d 344, 346-347 (C.A. 4), certiorari denied, 392 U.S. 932; *United States* v. *Lee*, 227 F. Supp. 450, 451 (D. N.Dak.). The apparent contention that Congress could not, consistent with the *ex post facto* clause of the Constitution, restrict his right to bear arms is also baseless, since the *ex post facto* clause is directed only at criminal penalties. *E.g.*, *Galvan* v. *Press*, 347 U.S. 522, 531-532; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593-596; *Lehmann* v. *Carson*, 353 U.S. 685.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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